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7 **UNITED STATES DISTRICT COURT**  
8 **CENTRAL DISTRICT OF CALIFORNIA**  
9 **EASTERN DIVISION**  
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11 ALVIN WILLIAMSON,

12 Petitioner,

13 v.

14 T. VIRGA, Warden,

15 Respondent.  
16

No. ED CV 12-1540-BRO (PLA)

**ORDER ADOPTING FINDINGS,  
CONCLUSIONS AND RECOMMENDATION  
OF UNITED STATES MAGISTRATE JUDGE**

17 **INTRODUCTION**

18 On July 16, 2013, the United States Magistrate Judge issued a Report and  
19 Recommendation ("R&R"), recommending that petitioner's Petition for Writ of Habeas Corpus be  
20 denied and the action dismissed with prejudice. Thereafter, on August 28, 2013, petitioner filed  
21 Objections to the R&R ("Objections").  
22

23 **DISCUSSION**

24 In his Objections, petitioner asserts that Ground Three of his Petition, i.e., ineffective  
25 assistance of appellate counsel, includes the additional claim that appellate counsel was  
26 ineffective for failing to argue on appeal that defense counsel rendered ineffective assistance for  
27 failing to request the removal of a juror after it came to light during trial that the juror had lied  
28 during voir dire. Petitioner asserts that he exhausted this claim concerning his appellate counsel

1 in state court and that it was included in Exhibit E attached to the Petition, and that the Magistrate  
2 Judge failed to consider it in the R&R. (Objections at 2-4).

3 Even if the Court assumes that petitioner properly raised this claim in the Petition and that  
4 it is exhausted, it fails on the merits.

5 As set forth in the R&R, for a claim of ineffective assistance of trial counsel, a petitioner  
6 must make two showings: (1) that his attorney's representation fell below an objective standard  
7 of reasonableness; and (2) that he suffered prejudice by demonstrating a reasonable probability  
8 that, but for counsel's error, the result of the proceeding would have been different. Strickland v.  
9 Washington, 466 U.S. 668, 687-88, 690, 694, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). To prevail  
10 on a claim of ineffective assistance of appellate counsel, a petitioner must show: (1) that his  
11 appellate counsel acted unreasonably in failing to discover and brief a merit-worthy issue; and (2)  
12 that he suffered prejudice by demonstrating a reasonable probability that, but for appellate  
13 counsel's failure to raise the issue, the petitioner would have prevailed in his appeal. Moormann  
14 v. Ryan, 628 F.3d 1102, 1106 (9th Cir. 2010), cert. denied, 132 S.Ct. 346 (2011).

15 Petitioner's claim of ineffective assistance of appellate counsel is connected with his claim  
16 in Ground One of the Petition, wherein he asserts that Juror No. 11 committed misconduct by  
17 failing to disclose during voir dire that she had a brother-in-law who was a San Bernardino police  
18 officer and worked in the anti-gang unit.<sup>1</sup> As the Magistrate Judge explained in the R&R, the  
19 record regarding this issue is very limited. No voir dire transcript was lodged with the Court, and  
20 the reporter's transcript reflects only a brief discussion between the trial court, the prosecution,  
21 and defense counsel about Juror No. 11. However, the record clearly reflects that petitioner's  
22 counsel was aware of the issue, yet declined asking the trial court to take any further action such  
23 as questioning Juror No. 11 or removing her from the jury for bias.

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26 <sup>1</sup> As set forth in the R&R in the discussion of Ground One, the record shows that during  
27 the prosecution's case, the trial court received a juror note that stated Juror No. 11 had a brother-  
28 in-law who is a police officer in San Bernardino and who works in a specialized anti-gang unit.  
(Supplemental Clerk's Transcript ("SCT") 2; see also RT 401, 433-34). The trial court then held  
a brief discussion on the record with the prosecutor and defense counsel, and both agreed that  
no further inquiry concerning Juror No. 11 was needed. (RT 453).

Under these circumstances, the Court concludes that petitioner's claim of ineffective assistance of appellate counsel is without merit. First, given the meager record, there is no showing that Juror No. 11 intentionally withheld the information about her brother-in-law at voir dire.<sup>2</sup> Moreover, even if Juror No. 11 had revealed this information during voir dire, it would not have provided a valid basis for a challenge for cause. See McDonough Power Equipment, Inc. v. Greenwood, 464 U.S. 548, 556, 104 S.Ct. 845, 78 L.Ed.2d 663 (1984) (to show actual bias, "a party must first demonstrate that a juror failed to answer honestly a material question on voir dire, and then further show that a correct response would have provided a valid basis for a challenge for cause"); see also Tinsley v. Borg, 895 F.2d 520, 529 (9th Cir. 1990) ("We will not presume bias merely because a juror works in law enforcement. . . . [D]emonstration of actual juror bias or beliefs is required."); United States v. Crooks, 83 F.3d 103, 107 n.16 (5th Cir. 1996) (without more, marriage to a law enforcement official is insufficient to constitute bias). Nor has petitioner demonstrated that Juror No. 11 was unable to decide the case impartially. It follows, therefore, that without more, petitioner has not demonstrated that there was a reasonable probability that, had trial counsel requested the removal of Juror No. 11, the request would have been granted and the outcome of the trial would have been any different. Accordingly, petitioner's underlying claim that trial counsel was ineffective is without merit. See Wilson v. Henry, 185 F.3d 986, 990 (9th Cir. 1999) (to show prejudice under Strickland from failure to file a motion, petitioner must show that (1) had his counsel filed the motion, it is reasonable that the trial court would have granted it as meritorious, and (2) had the motion been granted, it is reasonable that there would have been an outcome more favorable to him). In turn, petitioner has not shown that his appellate counsel was ineffective for failing to raise this issue on appeal, as doing so would have been a futile effort. In other words, there is no reasonable probability that, had this issue been included in the opening

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<sup>2</sup> As stated in the R&R, if, for example, Juror No. 11 was not close with her brother-in-law, she may have had the honest but mistaken belief that she did not need to reveal the relationship. See Price v. Kramer, 200 F.3d 1237, 1254-55 (9th Cir. 2000) (juror's failure to disclose that his half-brother was a police officer was an "innocent oversight" as the juror was estranged from his half-brother and had "honestly forgot to mention the relationship"; in any case, disclosure during voir dire would not have provided grounds for a challenge for cause).

1 brief, petitioner would have prevailed in his appeal. Rupe v. Wood, 93 F.3d 1434, 1445 (9th Cir.  
2 1996) (failure to take futile action can never be deficient performance).

3 On habeas review in the San Bernardino County Superior Court, petitioner's claim of juror  
4 misconduct was rejected on the grounds that "[t]he record makes clear that the lawyers made a  
5 tactical decision not to request the removal of Juror #11," and that "there was no juror misconduct  
6 which infringed upon Petitioner's constitutional rights." (Lodgment No. 10 at 3). The superior court  
7 also rejected petitioner's claim of ineffective assistance of appellate counsel, stating that "appellate  
8 counsel rightfully chose the most important, non-frivolous issues on which to focus," and that there  
9 was no deficiency in representation. (Lodgment No. 10 at 4). Here, petitioner has not rebutted  
10 the presumption of correctness that attaches to the superior court's findings that petitioner's trial  
11 counsel made a tactical decision with respect to Juror No. 11, and that there was no juror  
12 misconduct. See 28 U.S.C. 2254(e)(1). In turn, petitioner has not shown that the superior court's  
13 opinion rejecting his claim of ineffective assistance of appellate counsel was "so lacking in  
14 justification that there was an error well understood and comprehended in existing law beyond any  
15 possibility for fairminded disagreement." Harrington v. Richter, \_\_ U.S. \_\_, 131 S.Ct. 770, 786-87,  
16 178 L.Ed.2d 624 (2011). Accordingly, no habeas relief is warranted.

17 Petitioner also states in his Objections that, with respect to Ground Two (ineffective  
18 assistance of trial counsel), the six witnesses he claims his trial counsel failed to interview were  
19 in fact present at the scene of the incident and would have provided testimony regarding the  
20 shooting to support petitioner's defense, and that the Magistrate Judge's conclusion to the contrary  
21 amounted to an erroneous finding of fact. (Objections at 7).

22 In his declaration (attached to the Petition as Exhibit F), petitioner never states that any of  
23 the six witnesses observed the shooting. Rather, he states that they only would have provided  
24 testimony that the victim was known to be dangerous and to carry a gun. (Petition, Exhibit F at  
25 1-2). Accordingly, the Magistrate Judge concluded that, because none of the six was actually  
26 present at the scene and observed the incident, their proposed testimony would not have refuted  
27 the testimony of the prosecution witnesses who observed the shooting. Therefore, petitioner could  
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not show with any reasonable probability that, had any of these six witnesses testified, the jury would have reached a different verdict.

A district court has discretion, but is not required, to consider new factual allegations raised for the first time in a petitioner's objections. United States v. Howell, 231 F.3d 615, 621-22 (9th Cir. 2000). The Court declines to consider petitioner's belatedly-asserted allegations that the six witnesses were actually at the scene of the shooting and would have provided testimony regarding their observations. Although petitioner is pro se, he nevertheless had the opportunity to include these allegations at an earlier time, such as in an amended pleading, but failed to do so. Nor is there any indication that petitioner presented these new facts to the California courts when exhausting his state remedies. See Cullen v. Pinholster, \_\_\_ U.S. \_\_\_, 131 S.Ct. 1388, 1398, 179 L.Ed.2d 557 (2011) ("review under [28 U.S.C.] § 2254(d)(1) is limited to the record that was before the state court that adjudicated the claim on the merits"). As such, petitioner's new allegations in the Objections cannot serve as a basis for habeas relief.

The Court has reviewed petitioner's remaining objections and concludes that they are without merit.

### **CONCLUSION**

Based on the foregoing and pursuant to 28 U.S.C. § 636, the Court has reviewed the Petition, all of the records herein, the Report and Recommendation of the United States Magistrate Judge, and petitioner's Objections to the Report and Recommendation. The Court has made a de novo determination of the portions of the Report and Recommendation to which Objections were directed. The Court concurs with and adopts the findings and conclusions of the Magistrate Judge. Accordingly, IT IS ORDERED THAT:

1. Judgment shall be entered dismissing the action with prejudice.
2. The clerk shall serve this order and the judgment on all counsel or parties of record.

DATED: September 17, 2013

  
 HONORABLE BEVERLY REID O'CONNELL  
 UNITED STATES DISTRICT JUDGE